

No. 12,242

IN THE  
United States Court of Appeals  
For the Ninth Circuit

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OVE FOG,

*Appellant,*

vs.

R. C. WILLIAMS & Co., INC. (a corporation),

*Appellee.*

APPELLANT'S REPLY BRIEF.

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**INTRODUCTION.**

Appellee's brief serves only to emphasize the strength of appellant's contentions. It is a confession and attempt at avoidance but in that effort it fails.

The appellant, Ove Fog, was employed by appellee, R. C. Williams & Co., as its sales representative in the Pacific Coast Area. As compensation for his services he was to receive a stated salary plus a commission at so much per case on all liquors shipped into his territory. It was specifically understood and agreed that R. C. Williams & Co. was to make no shipments into Fog's territory except through his division.

This understanding and agreement was confirmed in writing. (Exhibit 14, R. 150.) There can be no dispute about that.

The importation and sale of Harwood whiskey was handled by R. C. Williams & Co. in the identical manner it handled other items upon which it recognized Mr. Fog's right to commissions. It purchased this whiskey from the Agencias Distilladores, sales agent for the distillery, acquired title thereto and resold it at a marked up price.

We may refer for a specific example to the shipment of two carloads of Puerto Rico rum by R. C. Williams into Mr. Fog's territory. This rum shipment was in violation of Mr. Fog's agreement. R. C. Williams & Co. recognized and admitted this and assured Mr. Fog it was a mistake and would not happen again. (R. 94.)

R. C. Williams & Co. recognized its obligation in the Puerto Rico rum situation. Then why should they not likewise recognize their obligation to pay agreed commissions on Harwood whiskey sales?

It is evident from the record that R. C. Williams purposely and willfully from the very first day that Fog demanded commissions on Harwood shipped into his territory schemed to defraud him by over and over again assuring him that they were handling the Harwood shipments, importation and billing as a matter of accommodation on behalf of the Canadian Distillery and not for their own account.

The fact is that R. C. Williams & Co. did handle Harwood whiskey for their own account. Mr. Fog first ascertained the true facts when given a copy of the contract shortly before the time of trial. This contract was introduced as plaintiff's exhibit 20 (R. 270) and undisputably shows that R. C. Williams & Co. purchased the whiskey, imported it into the United States and as owner thereof resold it at agreed and fixed mark up prices.

It was most conclusively established that R. C. Williams owned the Harwood whiskey and sold it in Mr. Fog's territory in the same manner as other merchandise imported by it. Therefore it follows that when R. C. Williams represented to Mr. Fog that "R. C. Williams Wholesale Department have the exclusive franchise of this whiskey for New York, *provided that they accommodate the Canadian distillery by clearing the merchandise for them and doing the billing in the United States* and that Koerner has nothing to do with the sales which are made by representatives of the UDL Distilleries in Vancouver." (Exhibit 6, R. 104.) That those untrue representations could only have been made for the purpose of defrauding Mr. Fog of his commissions. Those statements were wholly false, and must have been knowingly made for it was the outcome of a long meeting between the president of R. C. Williams & Co., Mr. Hugo Jaburg, a Mr. Koerner, the sales manager, and Mr. Jean Ravaud. These gentlemen certainly knew the true facts and condition of the Williams contract with Agencias Distilladores.



Appellee seeks to avoid its obligation to Mr. Fog by claiming that he knew that R. C. Williams “*had something to do with the sale of Harwood whiskey*” when he was induced to make the settlement. This is as far as they dare go. It is not and it cannot be asserted that Mr. Fog knew the *real facts* at the time of settlement. Nor can it be nor is it claimed that his knowledge *was clearly and conclusively established by the evidence.* (*West v. Great Western Power Co.*, 36 C.A. (2d) 403, 414.)

We will not burden this court with a detailed answer to appellee’s brief but feel that there are portions thereof that cannot be permitted to pass without reply.

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#### ALLEGED FALSE IMPRESSION.

On page 2 of appellee’s brief it is asserted that appellant seeks to create a false impression in claiming Mr. Fog worked for R. C. Williams & Co. rather than for Williams Importers. Appellee’s argument is specious but not sound. It is a distinction without a difference. Williams Importers was a department or “desk” of R. C. Williams & Co. and was not a separate or different entity. Mr. Fog was employed by R. C. Williams & Co. The company openly recognized this in confirming in writing the assurance that it would not ship into Mr. Fog’s territory except through his division. (Exhibit 14, R. 150.) In fact it was conceded that there was no issue as to Mr. Fog’s employment by the defendant. It was admitted in the plead-



ings and admitted by defendant counsel at the trial (R. 78) and recognized by the court.

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#### THE DEPOSITIONS ARE PROPERLY A PART OF THE RECORD.

Appellee asserts that the depositions of Hugo F. Jaburg, president of the defendant corporation, and Jean Ravaud, head of the branch of defendant corporation, are not properly a part of the record of this appeal. These depositions were referred to at the trial by defendant's counsel. (R. 299.) They were also used on the motion for new trial and are therefore properly a part of the record. We refer to Rule 26(d)(2) of the Rules of Civil Procedure of the District Courts of the United States for our authority in making use of the depositions.

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#### DEFENDANT'S CONTRACTS WITH DISTILLER'S AGENT.

Defendant did not have a contract with the distillers as was represented to Mr. Fog. Its contract was with the Agencias Distilladores, a Cuban corporation, which held a contract with the distillers for world distribution of Harwood whiskey. R. C. Williams & Co. purchased the whiskey from the Cuban corporation and not from the distillery. It purchased the whiskey for \$19.05 per case and sold it for \$20.77. These prices were fixed in the contract. It acquired title and owned the whiskey f.o.b. Vancouver, Canada. It was authorized, *but not required*, to pay brokerage or selling commissions, *not to exceed* 60 cents per case. According

to the evidence there were no such commissions paid. However this point is not important as to Mr. Fog's right to commissions.

Referring to the deposition of Mr. Jaburg (R. 55) we find under questioning by Mr. Jacobs, counsel for defendant, a reference to a "special Harwood agreement between the distillery and R. C. Williams" and that a brokerage of "60 cents was to be paid to brokers appointed by the distillery." This was untrue as the agreement was not with the distillery but with the Cuban corporation. Again we find in the deposition of Jean Ravaud (R. 64) "that Williams salesmen could not handle Harwood as Harwood was sold through brokers appointed by the distributor in Canada." He could not name any brokers and knew of none on the coast. (R. 65.) There is no evidence that any brokerage was ever paid by R. C. Williams. In fact the testimony shows that all sales were handled directly by R. C. Williams through its Mr. Koerner. (R. 115.) Defendant did not want to pay any brokerage or commissions.

On page 9 of appellee's brief we find a most significant statement which admits and explains defendant's motive in its dealing with Mr. Fog. It is pointed out that there was no sales resistance. It is there asserted that the defendant corporation was *compelled* under its Harwood contract to pay commissions to the distiller's agents. This statement we have established as untrue. R. C. Williams was authorized but not compelled to pay brokerage and commission *not to exceed* 60 cents per case to brokers or sell-

ing agents selected by *it*. (R. C. Williams & Co.) (R. 281.)

The significant statement is as follows: "With no sales burden on the division which employed plaintiff, it is no wonder that defendant corporation did not consider itself bound to pay additional commissions to plaintiff." In other words R. C. Williams wanted to and did retain the 60 cent commission for itself. It did not want to pay Mr. Fog his 25 cent commission. It explains why defendant, in order to accomplish its purpose, misrepresented the situation to Mr. Fog and why it kept him in ignorance of the true facts.

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**THE PLEADED CASE AND ALLEGED FAILURE OF  
EVIDENCE TO SUPPORT IT.**

Appellee's counsel place great stress upon the allegation in plaintiff's complaint that it was represented that "defendant corporation had nothing to do with the importation or sale of Harwood's whiskey in said western division area." The other allegations in the complaint are ignored particularly the allegation in paragraph IX (R. 5) that "after repeated statements made by it over a period of several months that defendant had not and was not handling the importation into or sale of Harwood's whiskey in said western division area."

It is argued that because plaintiff knew that defendant corporation "had something to do" with the importation and sale of Harwood whiskey that there-

fore plaintiff's case should fail. Plaintiff certainly proved that the defendant corporation did import and sell Harwood whiskey in plaintiff's area contrary to its representations that it did not. The distinction attempted to be made by appellee is immaterial and trivial and does not go to the essence of the complaint.

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**PLAINTIFF DID NOT KNOW THAT DEFENDANT CORPORATION WAS RECEIVING COMPENSATION FOR THE SALE OF SUCH WHISKEY.**

Next appellee asserts that plaintiff knew that the defendant corporation was receiving compensation for the sale of such whiskey by defendant corporation in his area. There is no merit in this. It was at all times represented to plaintiff that R. C. Williams did not import or sell Harwood whiskey for their own account. It was repeatedly asserted that they were only accommodating the distillery by billing and clearing the importations for them. It is true that Ackerman once wrote Fog that the defendant corporation "was *making* not more than \$1.00 per case" on all the Harwood that was sold. But it was further explained that "it was a different deal"; that they were not selling it and that Mr. Fog was not entitled to commissions because all sales were made by the distillery through its agents. That explanation we have shown was false and untrue. Never at any time was a full, frank or fair explanation made as to how Harwood whiskey was sold or that R. C. Williams in fact did import and sell this whiskey for their own account. To have

done so and to fully and fairly disclose the true facts would have defeated defendant's purpose of depriving Fog of his just commissions.

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#### THE PARTIES DID NOT DEAL AT ARM'S LENGTH.

The parties did not deal at arm's length. Plaintiff was the employee of defendant who was in possession of all the facts. In making a settlement with Fog the defendant corporation was in duty bound to make a fair and full disclosure of all the real facts. This it did not do and plaintiff was entitled to and justified in relying upon their representations.

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#### JABURG'S FAIRNESS.

Appellee makes a point of Mr. Jaburg's fairness. They refer to the time the defendant corporation shipped two carloads of rum into Fog's territory (R. 93) in violation of their agreement. Mr. Fog was assured it was a mistake and would not happen again. (R. 94.) This assurance was later given in writing. (Pltf. Ex. 14, R. 150.) But even then Mr. Jaburg asserted "*It was a different deal. We don't sell it,*" (Harwood whiskey) which only serves to emphasize the extent of Jaburg's unfairness and deceit for the evidence conclusively shows that they did sell it.



**THE NEWLY DISCOVERED EVIDENCE AVOIDING  
THE SETTLEMENT.**

We take issue with the statement that plaintiff's testimony is evasive or that it reveals a thorough knowledge of the method in which Harwood whiskey was introduced in Mr. Fog's territory. Our statement of the facts contained on page 18 through 23 of our opening brief refute that contention. The facts as therein related prove conclusively that Mr. Fog could not have known the true facts or the actual method by which Harwood whiskey was sold in his territory. All his efforts, month after month, to ascertain the true facts were futile. Those facts when opposed to the representations made by the defendant's officers amount to a demonstrative proof of the misrepresentations and deceit practiced upon Mr. Fog in their efforts to deprive him of his commissions. Throughout their brief appellee's counsel themselves admit these misrepresentations. Time and again it admitted that Mr. Jaburg assured Fog that "it was a different deal", "we don't sell it", they were merely accommodating the distillery, had nothing to do with the sales representation, and the other evasive explanations. Even at the trial it was maintained that R. C. Williams did not sell Harwood. (R. 113.) It is amazing then and bewildering too, that defendant's counsel should contend and the court find that Fog had a thorough knowledge of the method in which Harwood whiskey was handled.

As to the discovery of the true facts subsequent to the "settlement" we point out that they were not ascertained until Mr. Fog was subpoenaed by the

Bureau of Internal Revenue on January 28, 1948. We have sufficiently discussed this feature in our opening brief. But may we point out that the trial court erred in assuming that this information was not material. In the discussion at the time of making the motion the court labored under the impression that Mr. Fog knew these facts prior to the settlement. It stated that this information was contained in a letter (R. 307) "in which a man told about having to pay 60 cents a case." *There is no such letter.* The 60 cents a case brokerage or commission provision was not made known until plaintiff's counsel took the deposition of Mr. Jaburg.

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#### THE CLAIM THERE WERE NO FALSE REPRESENTATIONS.

On page 24 of appellee's brief are cited four representations which we claim were false. It is not denied that they were made. However it is claimed that they were not false and a vague and confusing effort is made to justify that statement. We reiterate that the evidence and the admissions in appellee's brief do establish their falsity. The evidence conclusively shows that:

1. R. C. Williams did sell Harwood for their own account and did not handle it only as a matter of accommodation for the distillery.

2. Sales were not made by distributors for the distillery; R. C. Williams did not merely do the clearing and billing for which it received \$1.50 per case nor did it have to pay the brokers for the distillery their commission out of the \$1.50.



3. R. C. Williams did net more than \$1.00 per case.

4. The agreement was not by contract with the UDL (the distillery in Vancouver) in consideration for the privilege of wholesaling Harwood in the New York metropolitan area, but was with Agencias Distilladores.

Plaintiff's Exhibit 20 (R. 270) irrefutably establishes their falsity.

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#### A DISTINCTION WITHOUT DIFFERENCE.

It is next claimed that the facts discovered by plaintiff after the settlement are a distinction without a difference. We fail to see it. There is a difference. Under the actual and true facts R. C. Williams purchased the whiskey outright for their own account from the Cuban corporation. It was vested with title upon delivery f.o.b. Vancouver. It resold this whiskey through its man Koerner in the United States at an agreed mark up and made a profit of \$1.60 per case. Under those circumstances it was obligated under its agreement with Fog to pay him his commissions. Such procedure was the same as with any other merchandise it imported and paid him his commissions.

On the other hand if R. C. Williams did not take title or ownership but merely as a matter of accommodation cleared and billed the liquor upon sales made by brokers for the distillery then perhaps Mr. Fog would not be entitled to a commission as explained by Mr. Fog. (R. 266.) The reason being that in such

a case R. C. Williams did not sell but would have acted as an agent on behalf of the distillery.

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**PLAINTIFF IS ENTITLED TO COMMISSIONS ON SALES OF  
HARWOOD AFTER SETTLEMENT OF MARCH 8, 1946.**

When plaintiff was finally prevailed upon to accept the \$10,000 "to take the bad taste out of his mouth", defendant's counsel prepared a settlement agreement that was designed to forever foreclose any claim for commissions on Harwood past, present or future. When the proposed agreement was submitted to Mr. Fog he called attention to the fact that the provision assuring him that R. C. Williams would sell no merchandise in his territory except through his division (Ptff. Ex. 14, R. 150) had been omitted. (See Ptff. Ex. 18, R. 180.) As a result Mr. Fog was called to New York for a conference and at that conference he again brought the matter up. At that time he was assured—"You already have that guarantee. As a matter of fact, you have it in writing." (R. 189.) He was also given the same assurance by Mr. Jaburg. (R. 193.) Those promises were made under the pretense of friendship but with tongue in cheek and with no intention of living up to them. We cite this incident to show how the defendant's officers and counsel carried their perfidy and deceit to the very end in an effort to induce him to accept the "settlement". Under the written assurance referred to Mr. Fog was entitled to his commissions earned after the settlement of March 8, 1946.

## SUMMARY.

The decision in this case was made off the bench and in our humble opinion was one of first impression and not after mature consideration of the evidence. The court based its decision, judging from its comments at the presentation of the motion, on the theory that the plaintiff knew the fact that R. C. Williams caused the whiskey to be introduced into this market. Under the court's theory the essence of plaintiff's claim was not the means by which the whiskey was introduced into this market, the papers they signed, the nature of their contract, but the fact that defendant caused the whiskey to be introduced into the market. (R. 304-305.) It stated that Mr. Fog was entitled to commissions and that he would have done better had he been represented by an attorney. (R. 296.) It thus ignored the circumstances under which the whiskey was shipped, the relations between the distiller, the Agencias Distilladores, Williams and Mr. Fog. It evidently placed no importance on the issue as to whether or not R. C. Williams was accommodating the distillery, as it represented, or whether it was importing and selling for its own account. It placed no value on the fact that Mr. Fog first discovered the true facts when subpoenaed by the Bureau of Internal Revenue. The court was in a material and serious error in thinking that Mr. Fog knew that Williams Co. had to pay the alleged 60 cent brokerage stating that it saw a letter to that effect. (R. 307.) In this it was in error because *there was no such letter*. That information first was revealed when the deposition of Mr. Jaburg was taken and later when the contract with Agencias Distilladores was produced. In

all these viewpoints, as a basis for its decision, the court was in error. As the court thus patently labored under an erroneous conception of the evidence and based its decision thereon, the judgment should be reversed.

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### CONCLUSION.

The court should have considered the evidence in a light most favorable to plaintiff and permitted the trial to proceed to its final and full conclusion in order that all the facts and evidence be before it for its determination.

But nevertheless based upon the record as it stands plaintiff did establish that the defendant did misrepresent the situation. Never was there made a full and fair disclosure of the true facts. Certainly the knowledge of Mr. Fog concerning the real facts which would prevent his relying on or being misled by defendant's representations was not clearly and conclusively established by the evidence. The evidence conclusively shows that it was impossible for plaintiff to have known the true facts at the time the settlement was made. He was entirely dependent on the information given him by defendants and he was entitled to rely upon their statements. We respectfully submit that for the foregoing reasons the order granting the motion for dismissal should be reversed.

Dated, San Francisco, California,

December 21, 1949.

**RICHARD TUM SUDEN,**

*Attorney for Appellant.*

